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Environmental Law

The Negotiable Implementation of Environmental Law

Dave Owen[1]

On the outskirts of an American city, a company wants to build a factory. Its preferred site has developable land, proximity to a trained workforce, and good transportation access, but developing the site will raise environmental challenges. Long ago, the site saw heavy industrial use, so its soil and groundwater are probably contaminated. Since those industrial uses lapsed, wildlife has come back, including some endangered species, and wetlands dot the terrain. Developing the site will require filling wetlands and paving over some of the upland habitat. Once the factory begins operating, it will emit air pollution and discharge treated wastewater into the adjacent river.

For the company's attorneys, addressing these environmental challenges will mean obtaining multiple permits and other regulatory approvals, which in turn will require extended interactions with regulators. Much of that interaction will involve negotiation—which I mean to refer to situations in which participants discuss proposals and counterproposals, but not to situations in which a regulator accepts input but makes a unilateral decision. Lawyers and consultants will meet, probably repeatedly, with regulators, send dozens of emails, and spend hours on the phone hammering out the terms of air-quality and water-quality permits, of the protections for wetlands and upland habitats, of the ways in which the company will compensate for the impacts it creates, of the extent to which contamination must be cleaned up, and of the land use restrictions that will protect the site's future occupants from contamination that remains in the ground. Behind the scenes, regulators may negotiate with each other and perhaps also with environmental groups, other community advocates, and—if the company has enough clout—the project's political supporters. Even after the project is built, some permits will require periodic renewals, and the company may be subject to enforcement actions, each generating new negotiating rounds. Environmental law, as it applies to the factory, will be the product of these negotiations.

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[1] Excerpted and adapted from Dave Owen, *The Negotiable Implementation of Environmental Law*, 75 STAN. L. REV. 137 (2023).

To many practicing environmental lawyers, this hypothetical scenario would sound routine. Negotiating the terms of compliance with environmental laws is what they do. But theoretical accounts of environmental law tend to miss the part negotiation plays in this story—as does traditional environmental-law education.[2] In much of the discourse of environmental-law implementation, negotiation is absent, and when scholars and policy advocates do address the roles of negotiation, they tend to default to two competing conceptions. In one—call it the "command and control" view[3]—environmental law is centralized and rigid.[4] Its core provisions emerge from top-down federal rulemakings and apply uniformly across large sectors of regulated activity.[5] In the other—call it the "slippage" view—the rigid protections exist on paper but not in practice, and environmental-law implementation involves government regulators allowing regulated industries to get away

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[2] *See, e.g.*, ROBERT V. PERCIVAL, CHRISTOPHER H. SCHROEDER, ALAN S. MILLER & JAMES P. LEAPE, ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 155–61 (9th ed. 2022) (discussing and comparing regulatory strategies without mentioning negotiation); *see generally* DANIEL A. FARBER, ANN E. CARLSON & WILLIAM BOYD, CASES AND MATERIALS ON ENVIRONMENTAL LAW (10th ed. 2019) (addressing negotiation only briefly and in limited contexts). Though coverage of the subject is rare, some legal academics have written thoughtfully about negotiations in particular areas of environmental law. *See, e.g.*, Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 653–61 (2000) (describing negotiated implementation of environmental law in a few specific contexts); Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 33–69 (2011) (describing federal-state negotiations). Not surprisingly, negotiation specialists have given environmental negotiations more attention. *See, e.g.*, LAWRENCE SUSSKIND, PAUL F. LEVY & JENNIFER THOMAS-LARMER, NEGOTIATING ENVIRONMENTAL AGREEMENTS: HOW TO AVOID ESCALATING CONFRONTATION, NEEDLESS COSTS, AND UNNECESSARY LITIGATION (2000).

[3] In the environmental-law field, the phrase "command and control" is widely and imprecisely used. *See* Jodi L. Short, *The Paranoid Style in Regulatory Reform*, 63 HASTINGS L.J. 633, 658–59 (2012). I use it here because of its popularity among environmental law's critics.

[4] *See* Timothy F. Malloy, *The Social Construction of Regulation: Lessons from the War Against Command and Control*, 58 BUFF. L. REV. 267, 268–69 (2010).

[5] *See, e.g.*, Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 97–98 (1995).

with varying degrees of non-compliance.[6] In the command-and-control view, negotiation exists only in exceptional circumstances.[7] In the slippage view, negotiation is common, but it serves only to decide how far real-world practices can deviate from the law.[8]

Both views are mistaken. Negotiation is a defining feature of environmental law. It recurs across substantive fields.[9] It occurs at every level of policymaking and implementation—not just in legislative processes, where everyone would expect to find it, and in notice-and-comment rulemaking, but also all the way down to the crafting of individual permit terms, even in subfields widely perceived as prescriptive and rigid.[10] And negotiators aren't just deciding degrees of slippage, though sometimes that is their task.[11] Instead, in many realms of environmental law, the actual standards to be applied, the nature of the actions being evaluated, and the interpretation of key facts surrounding those actions are all up for negotiation. Negotiation therefore is not an evasion of governing statutory law—or, at least, it *often* is not such an evasion. Instead, it is a core element of the system's design. And while not everything in environmental law is negotiable, enough things are that framing the options for negotiation and specifying the situations when it may occur (or may be avoided) are both core tasks for the designers of environmental-law systems. One cannot understand environmental law, in other words, without understanding the roles of negotiation.

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[6] *See, e.g.*, Daniel A. Farber, *Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law*, 23 HARV. ENV'T L. REV. 297, 299 (1999); Mary Christina Wood, *Nature's Trust: Reclaiming an Environmental Discourse*, 25 VA. ENV'T L.J. 243, 252–55 (2007).

[7] *See, e.g.,* Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21, 25 (2001).

[8] *See* Farber, *supra* note 6, at 320 ("[S]lippage is another name for noncompliance.").

[9] The research for this article drew partly on written documentation of regulatory practices. But because that documentation often leaves negotiation unmentioned, even in realms where it is centrally important, the core of the research was forty-three semi-structured interviews with environmental attorneys and regulators.

[10] *See* SUSSKIND ET AL., *supra* note 2, at 28 (arguing that environmental permitting includes many opportunities for negotiation).

[11] *See, e.g.*, Interview with U.S. Fish & Wildlife Service Official (Sept. 13, 2021) (describing negotiations over the degree of delay in Endangered Species Act listings).

That is true across a range of environmental-law subfields. Waste-site cleanups are heavily negotiated—and, somewhat uniquely, that central role of negotiation is widely acknowledged in commentary and openly encouraged in governing law. Clean Water Act and Clean Air Act permitting, both of which commentators often describe as textbook examples of formulaic regulation, routinely involve negotiation. As one water-quality regulator explained, "it's very rare where we send a draft . . . to an applicant, or even an existing permittee, and they just say, 'okay, fine. We'll take it.' There is always something."[12] Likewise, compliance with the National Environmental Policy Act and its state-law counterparts is negotiated, with project proponents, reviewers, and opponents often discussing what projects will be pursued, how those projects' impacts will be described, and how, if at all, those impacts will be mitigated. Even the Endangered Species Act, which a former Secretary of the Interior once described as "perhaps the least flexible law Congress has ever enacted,"[13] is implemented largely through negotiated deals. As one experienced ESA attorney quipped, only slightly facetiously, "it's all negotiation, actually."[14]

The centrality of negotiation has important and underappreciated implications for the field. For the command-and-control theorists, the implications are straightforward: There is a lot less centralization and rigidity than the theorists allege, and their prescribed fixes may be solutions in search of problems. For the slippage critique, the implications are more nuanced. In most versions of this critique, negotiation is problematic: it is how public agencies give away the store.[15] But by presuming that the nature of compliance is known to all parties at the outset and that the negotiations just determine how much deviation from those standards will be allowed, the slippage critique misses the

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[12] Interview with State Water Quality Regulator (Oct. 21, 2021); *see* Interview with State Water Quality Regulator (Aug. 23, 2021) ("It's the rare exception that we ever put something out in a take-it-or-leave-it fashion.").

[13] Dirk Kempthorne, U.S. Sec'y of the Interior, Press Conference on Polar Bear Listing (May 14, 2008).

[14] Interview with Private Firm Attorney (Oct. 8, 2021).

[15] *See* Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift*, 39 ENV'T L. 43, 44–45 (2009).

constitutive role that negotiations often play. In reality, there is often neither a predefined legal standard for compliance, nor agreement about the relevant facts, nor even a fixed plan of action. Negotiation helps determine what the law will be, how it will apply, and what it will apply to. Negotiation, in other words, often defines what compliance is and thus helps create obligations, rather than determining what level of noncompliance is acceptable. It therefore is often a prerequisite rather than an impediment to effective environmental law.

This description casts environmental-law negotiations in a somewhat positive light, and for good reasons. Negotiation has its benefits. But the pervasiveness of negotiation also should raise concerns about the quality, scope, and transparency of negotiations. Environmental negotiation has developed somewhat organically and with little transparency. Finding documentation explaining what is negotiable, what the parameters of the negotiation should be, or how similar negotiations are resolved elsewhere in the same agency is difficult. Sophisticated entities can manage that problem by hiring consultants and attorneys who understand the unwritten rules of the game.[16] But for disadvantaged communities—which often are acutely in need of the protections of environmental law[17]—and for smaller regulated entities, a negotiation-based system can create particularly difficult burdens.[18] Agency staff, meanwhile, often have spotty training in negotiation—a deficiency that also extends to environmental education, legal and otherwise.[19] The absence of training and a lack of systematic guidance within agencies mean that their efforts, while well-intentioned, can be

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[16] *See* Dave Owen, *Consultants, the Environment, and the Law*, 61 ARIZ. L. REV. 823, 830–33 (2019) (describing the services environmental consultants provide).

[17] *See generally* LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT (2001).

[18] *See* Email from Environmental Organization Representative to Author (Oct. 19, 2021) ("When negotiations do occur, it is difficult to ensure sufficient resources are available."); Interview with Former Environmental Protection Agency Attorney (Oct. 26, 2021) (describing public meetings that were "almost exclusionary by design").

[19] *See supra* note 1 (citing leading environmental-law textbooks).

erratic and inconsistent.[20] The absence of documentation also makes evaluating current approaches to negotiation difficult, but ample anecdotal evidence suggests that negotiation-based systems do not serve the underlying values of environmental law as well as they could.

These problems have potential, if partial, fixes. Agencies can increase the transparency of negotiations by disclosing settings in which negotiations can occur and subjects that are appropriate for negotiations, and by explaining what documents and proposals help agency regulators, regulated entities, and interested environmental or community groups reach better deals. Agencies also can boost transparency by providing more information about the outcomes of previous negotiations. Regulatory agencies can also increase their negotiating efficacy, not only by offering more transparency and guidance to their own employees, but also by increasing the resources devoted to negotiation training. These reforms can make regulatory negotiations more equitable, as can mechanisms like intervenor funding and heightened technical support for community groups.[21]

The burden of reform should not fall solely on agencies. Educators—both in law schools and in other areas of environmental education—also can help by exposing students to the prevalence and roles of environmental negotiations and by preparing their students to participate in negotiated processes. And judges should understand, when adjudicating issues relating to permits and violations, that negotiation was likely an essential part of the parties' expectations of their rights and obligations.

The benefits of these improvements could be substantial, especially on a larger scale. As academic and popular-media commentators alike have noted, the United States cannot do its part to address the climate crisis without a massive buildout of new infrastructure.[22] That buildout will probably require navigating

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[20] *See* Interview with Private Firm Attorney (Aug. 30, 2021) ("They're [environmental-agency negotiators] young, they're eager, they want to do a good job, but they're not properly resourced."); Interview with U.S. Fish & Wildlife Service Official (Sept. 13, 2021) ("[O]ftentimes, we've got a GS-9 biologist sitting across the table from three people in $1,500 suits.").

[21] *See* NAT'L ASS'N OF REGUL. UTIL. COMM'RS, STATE APPROACHES TO INTERVENOR COMPENSATION (2021).

[22] *See* Ezra Klein, *What America Needs Is a Liberalism that Builds*, N.Y. TIMES (May 29, 2022); Michael B. Gerrard, *Legal Pathways for a Massive*

many of environmental law's negotiation points.[23] If that can be done efficiently and in ways that produce both better economic outcomes for regulated industries and stronger environmental protections, the nation and the world will benefit.

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Increase in Utility-Scale Renewable Generation Capacity, 47 ENV'T L. REP. 10,591, 10,592 (2017); J.B. Ruhl & James Salzman, *What Happens When the Green New Deal Meets the Old Green Laws?*, 44 VT. L. REV. 693, 704–13 (2020).

[23] *See* Gerrard, *supra* note 22, at 10,603–13.